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BEYER WEAVER LLP P.O. BOX 70250 OAKLAND, CA 94612-0250				
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			12/28/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/623,339

Applicant(s)

BEAMAN, ALEXANDER B.

Examiner

Steven B. Theriault

Art Unit

2179

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. This action is responsive to the following communications: Affidavit filed 10/11/2007

This action is made Final.

2. Claims 1 -32 are pending in the case. Claims 1, 8, 16, 17, 20, 21, and 26 are the independent claims.

Response to Amendment

3. The Affidavit filed on 10/11/2007 under 37 CFR 1.131 has been considered but is ineffective to overcome the Born et al. reference. Further, the evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the Born reference to either a constructive reduction to practice or an actual reduction to practice. Moreover, the evidence submitted is insufficient to establish a reduction to practice of the invention in this country or a NAFTA or WTO member country prior to the effective date of the Born et al. reference.

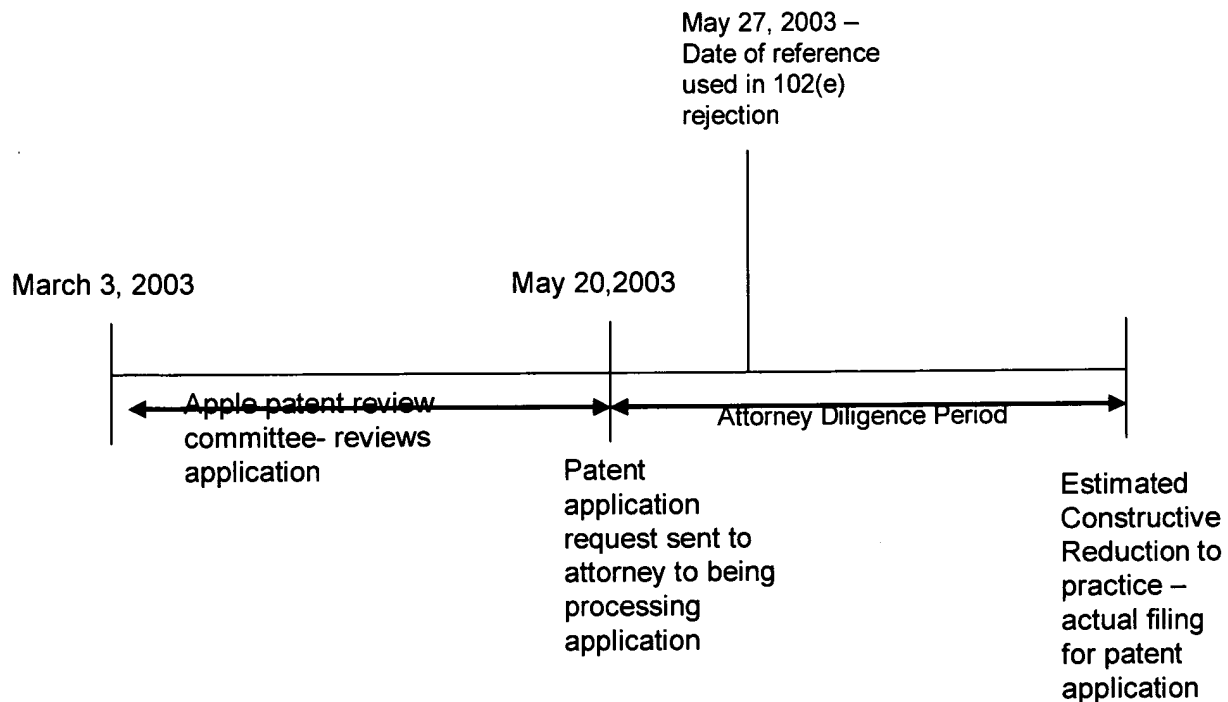
The Examiner relied on the following to conclude that the 1.131 affidavit submitted on 10/11/2007 is insufficient.

There are three ways an applicant can show prior invention according to MPEP 715.07. An affidavit showing, 1) Actual reduction to practice prior to the date of the reference 2) conception of the invention prior to the date of the reference coupled with due diligence from prior to the reference date to a subsequent actual reduction to practice, 3) conception of the invention prior to the date of the reference coupled with due diligence from prior to the reference date to the filing date of the application.

The applicant does not claim an actual reduction to practice; therefore we will not consider the first scenario. In the second scenario there is no evidence to support actual reduction to practice other than the filing of the application on July 18, 2003. While the statement made by the applicant attests to diligence during the periods of March 3- May 20, 2003 and May 20, 2003 - July 18, 2003, the Exhibit contains no evidence or facts to support the assertion. The office position is that the applicant is

attempting to prove the invention via the third scenario, as they claim conception and diligence prior to the reference date of the application.

MPEP 715.07 establishes facts and evidence to be considered when evaluating a 1.131 document. In this case, the Exhibit includes an inventor disclosure document outlining the general features of the invention along with a statement made by the applicant. The Exhibit does not include evidence or facts to support diligence or that the actual reduction to practice has occurred. The MPEP is clear that when an applicant makes a general allegation or broad statement, in terms of what the exhibits describe or that the invention has been reduced to practice, that if these statements are made without supporting evidence then the statements amount essentially to mere pleading, as there is no supported proof or showing of facts. In this case, the documents submitted are sufficient to prove the applicant has conceived the invention on March 3, 2003. However, the statements do not include facts to support either a constructive or actual reduction to practice of the invention until July 18, 2003 or show reasonable diligence during the period. The Examiner constructed the following time pattern:



Based on the above timeline, the applicant has claimed that they have conceived of their application on March 3, 2003 and provided an inventor disclosure document. Applicant attests that he sent the disclosure, see exhibit, to the patent review committee. The document was reviewed and a decision was

made by the committee on May 20, 2003 to file the patent application. The attorney for the applicant processed the application and filed the application on July 18, 2003. The inventor stated he claimed diligence on July 18, 2003 in filing the application and that the patent review committee also diligently worked on the application from March 3- May 20, 2003. The effective date of the reference used in the rejection is May 27, 2003, whereby applicant is attempting to overcome this reference with the evidence submitted via 1.131.

MPEP 715.07 is clear regarding conception and reduction to practice. MPEP 715.07 states: "a conception of an invention, though evidenced by disclosure, drawings, and even a model, is not a complete invention under the patent laws and confers no rights on an inventor and has no effect on the subsequently granted patent to another. UNLESS THE INVENTOR FOLLOWS IT WITH REASONABLE DILIGENCE BY SOME OTHER ACT, such as actual reduction to practice or filing of the application for a patent." In this case, the applicant has not provided evidence to support that the invention was reduced to practice on March 3, 2003. There are two key pieces of evidence to support the Examiners assertion. First, on May 20, 2003 the applicant requests their representative to draft the application but in the statement on May 20, 2003 they state that only after the sample claims had been drafted and sent back to the client, over a period of two weeks, would authorization be given to proceed, which would in essence put the authorization on or about the first week of June, clearly after the effective date of the reference used in the rejection.

Second, it would appear from the inventors statement that "the disclosure document is sufficiently detailed to prove conception but also would allow one of ordinary skill in the art to reduce the invention to practice" by reading the disclosure, suggests that the invention was not actually reduced to practice at that time. Further, MPEP 715.07 requires that when a claim is made to reducing an invention to practice that proof of actual reduction to practice requires a showing that the apparatus actually existed and worked for its intended purpose. The exhibit does not appear to convey in sufficient detail to the Examiner that the application worked or existed.

Further, the exhibit does not appear to show diligence from the March 3, 2003 date to the constructive reduction to practice achieved when filing the patent application on July 18, 2003. MPEP 2138.06 states that the entire critical period during which diligence is required must be accounted for by either affirmative acts or acceptable excuses. The applicant's statement that "the Apple patent review committee was diligently evaluating the proposed idea to determine whether to file a patent on it", suggest to the Examiner, a period of inactivity in order to exploit the invention commercially and does not constitute diligence in reducing it to practice.

MPEP 2138.06 specifically states that "The work relied upon to show reasonable diligence must be directly related to the reduction of practice of the invention". MPEP 2138.06 further states "The court

has distinguished that diligence was not found because the inventors has discontinued development or failed to complete the invention while pursuing financing or other commercial activity.”

The period of May 20, 2003 through July 18, 2003 is also not accounted for in the exhibit and appears to be directed to attorney diligence in preparing the application. The exhibit does no appear to provide evidence as to reasonable diligence performed during the critical period on the part of applicant's representative. MPEP 2138.06 outlines acceptable diligence has been found where six days to execute and file an application. In this case, the representative was notified on May 20, 2003 and filed the application on July 18, 2003, which is well over a six day threshold.

It is not clear from the affidavit that reasonable diligence has been established, as there are no records, journals, statements or even a log to show when the applicant has executed acts to reduce the invention to practice during the two periods mentioned above. Further, it appears that the constructive reduction to practice, according to MPEP 2138.05 (I.), states that proof of constructive reduction to practice requires a sufficient disclosure under the "how to use" and "how to make" requirements of 35 USC 112, first paragraph. The Examiner contends that the exhibit does not recite "how to use" or "how to make" the claimed invention and lacks the written description requirement of 112, first.

In summary, the Examiner has maintained the previous rejection, based on the 102(e) rejection over Born because the exhibit contains evidence to prove conception, but does not contain evidence to support actual or constructive reduction to practice or diligence during the critical period and it has been determined that the constructive reduction to practice, based on evidence occurred on the filing date of the application.

Claim Rejections - 35 USC § 102

4. **The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:**

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. **Claims 1-2, 4, 8-29 are rejected under 35 U.S.C 102(e) as being anticipated by Born et al. (hereinafter Born) U.S. Publication 2005/0045373 published May 27, 2003.**

In regard to **Independent claim 1**, Born teaches a method for providing an audio menu, comprising:

- Providing text strings on a server, each text string capable of representing a menu choice (See Born Para 015) Born teaches the menu is provided to the device as a textual description.
- Generating audio files, each audio file representing a voiced name of one of the text strings (See Para 015) Born teaches the textual description is saved as an audio prompt.
- Associating each of the audio files with the text string corresponding thereto (See Para 016) Born teaches there are different prompts for sections of the menu.
- Delivering the audio files to a client from the server (See Para 015). Born teaches the audio prompt is delivered from the server.
- Presenting a menu on the client that includes menu choices represented by the text strings, the menu choices being capable of being highlighted or selected (See Para 019) Born teaches presenting the menu to the user where the menu is described textually by the server and where the audio is played when the user selects it.
- Playing the audio file on the client when the associated menu choice is highlighted (See Para 0038 and 0050) User select items from the menu and the menu items are played

With respect to **dependent claim 2**, Born teaches the method further comprising providing a remote control that can navigate through the menu on the client (Born Para 0036). Born teaches a microphone and speakers and other wireless audio controls that can manipulate the menus.

With respect to **dependent claim 4**, Born teaches the method wherein: the client is capable of playing music; and playing the audio file when music is playing does not stop the music from playing (See Para 0077) Born teaches the music is muted but not stopped from playing.

In regard to **Independent claim 8**, Born teaches a method for creating audio menu

components, wherein the audio menu components represent navigational components directed to the selection of media content, comprising:

- Providing a text string that represents a menu component, whereby the menu component is one of several options that can be selected from a displayed menu on a client device (See Born Para 015) Born teaches the menu is provided to the device as a textual description and the menu comprises more than one choice.
- Generating an audio file that is an audio representation of the menu component; delivering the audio file to a client device (See Para 015) Born teaches the textual description is saved as an audio prompt.

With respect to **dependent claim 9**, Born teaches the method further comprising: playing the audio file; and requesting approval of the played audio file prior to delivering the audio file to a client device (See Para 0049 and 0050).

With respect to **dependent claim 10**, Born teaches the method wherein generating the audio file is accomplished via a text-to-speech algorithm (See Para 0054).

With respect to **dependent claim 11**, Born teaches the method wherein if approval is not given, providing an opportunity to modify the text string; and if the text string is modified, replacing the audio file with a new audio file generated from the modified text string, playing the audio file, and requesting approval of the played audio file (See Para 0057 and 0058) User provides approval to add a new component and then the server generates a new audio file and it is sent to the device.

With respect to **dependent claim 12**, Born teaches the method wherein if the text string is not modified, providing an opportunity to replace the audio file with a new audio file generated from an audio recording (See Para 0056 and 0057).

With respect to **dependent claim 13**, Born teaches the method wherein the audio file generation includes at least compression of the audio file (See Para 0054).

With respect to **dependent claim 14**, Born teaches the method wherein the delivery of the audio files includes embedding the audio files in metadata (See Para 0038).

With respect to **dependent claim 15**, Born teaches the method further comprising determining whether the audio file is present on the client device; wherein, delivering the audio files is performed only if the audio file is not present on the client device (See Figure 2) The system contains its own media database that would play a song if the audio is on the device.

In regard to **Independent claim 16**, Born teaches a server comprising:

- A processor; and memory, operably connected with the processor (See Figure 3) CPU and memory in a server 304, 318 and 102.
- Wherein the processor is operable to perform instructions including providing a text string that represents a menu component, wherein the audio menu components represent navigational components directed to the selection of media content (See Para 0050-0054).

Born teaches a text string is generated at the server as a menu component and is sent back to the device (See also Para 0018).

- Generating an audio file that is an audio representation of the menu component; delivering the audio files to a client device (See Para 0047 and 0050-0054) Born generates an audio file for each menu component and sends the audio file to the device.

In regard to **Independent claim 17**, Born teaches a method of using audio files in a menu comprising:

- Receiving an audio file that is an audio representation of a menu component, whereby the menu component is one of several options that is selectable from the menu (See Para 0047) Born teaches an audio file accompanies a menu component where the audio file is an

audible description of the menu component that is played once the user selects the menu item (See also Para 0070).

- Playing the audio file when the menu component is chosen (See Para 0049) Born teaches the audio is played once selected.

With respect to **dependent claim 18**, Born teaches the method wherein: the menu includes menu components that have not been received; and pre-packaged audio files are associated with the menu components that have not been received (See Para 0047) Born teaches the new components are added to the media database along with the new textual descriptions of the items.

With respect to **dependent claim 19**, Born teaches the method wherein the audio file is played only after the menu component has been highlighted for a predetermined period of time (See Para 0072 and 0074) System waits for user input

In regard to **Independent claim 20**, Born teaches a client device comprising:

- A processor; and a memory, operably connected with the processor (See Figure 2, 204, 210 and 108).
- Wherein the processor is operable to perform instructions including receiving an audio file that is an audio representation of a menu component, wherein the audio menu components represent navigational components directed to the selection of media content (See Para 0015-0019 and 0038 and 0050-0054) Born teaches the processor receives audio files from the server where the audio file is a menu component and the menu can be navigated by the user on the device.
- Updating the menu to include the menu component playing the audio file when the menu component is chosen (See Para 0054) Born teaches adding a menu component and updating the media database with the new component and where the audio representing the menu is played once selected.

In regard to **Independent claim 21**, Born teaches a media management system comprising:

- A media database that stores media files (See Figure 2, Media Database). Born shows the database in memory and the media player that manages the media items in the database (See Para 0014-0016)
- Media collection records that include data relating to groupings of the media files (See Para 0038). The database contains an index the media files that are organized.
media records that include metadata relating to the media files
- A voiced names database that stores audio files (See Figure 2, 240)
- Association records that associate the audio files with data from the media collection records and metadata from the media records (See Para 0038) Born teaches the metadata ID tag for a given audio file is stored in the indexed database and recognized once selected from the menu.

With respect to **dependent claim 22**, Born teaches the media management system wherein the media management system is executed on a portable digital music player (See Para 0014).

With respect to **dependent claim 23**, Born teaches the method wherein the audio file is received from a server (See Para 0015).

With respect to **dependent claim 24**, Born teaches the method wherein the menu component is highlighted when chosen (See Para 0050).

With respect to **dependent claim 25**, Born teaches the method wherein said method further comprises: updating the menu to include the menu component (See Para 0054).

In regard to **Independent claim 26**, Born teaches a client device comprising:

- a processor a memory, operatively connected with the processor, the memory storing media content and metadata for a plurality of media items, the memory also storing audio

content representing associated with the metadata for the media items (See figure 2)

Born teaches a memory and a processor that comprises not only a media database but also storage for the metadata attached to the audio content (See Para 0079).

- wherein the processor is operable to perform instructions including receiving a selection of one of the media items and then playing the audio content for at least a portion of the metadata representing associated with the selected one of the media items (See Para 0050-0054 and 0079). Born teaches the operating system uses the ID tag within the metadata tag to determine the media to play. The specific tag is in relation to the menu selection made by the user to play the given audio item.

With respect to **dependent claim 27**, Born teaches the client device wherein the processor is further operable to perform instructions including playing the media content for the selected one of the media items concurrently with the playing the audio content for at least the portion of the metadata associated with the selected one of the media items (See Para 0077) Certain actions may interrupt but others may not. A muted content is still playing in the background for the audio prompt actions.

With respect to **dependent claim 28**, Born teaches the client device wherein the processor is further operable to: present a menu on the client that includes menu choices represented by the text strings, the menu choices being capable of being highlighted or selected; and play the audio file on the client when the associated menu choice is highlighted (See Para 0015-0019).

With respect to **dependent claim 29**, Born teaches the client device wherein the processor is further operable receiving instructions from a remote control to navigate through the menu (See Para 0036).

Claim Rejections - 35 USC § 103

6. **The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:**

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. **Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Born et al. (hereinafter Born) U.S. Publication 2005/0045373 published May 27, 2003 in view of Gallenson et al (hereinafter Gallenson) WO 01/30046 International Publication Date 26 April 2001.**

With respect to **dependent claim 3**, as indicated in the above discussion, Born teaches each element of claim 1.

Born does not expressly teach the method wherein the voiced names are in a language other than English.

However, this limitation would have been obvious to one of ordinary skill in the art at the time of the invention, in view of Gallenson, because Gallenson teaches a streaming content system that can deliver audio content to a device where the device can determine from the users profile the

dialect and language of the user and adapt the system to match the content to the user (See page 17, lines 1-12). Gallenson and Born are analogous art because they both provide access to content through a menu system in a portable device. The skilled artisan having the teachings of Gallenson and Born in front of them, would determine from the suggestions in Gallenson to that the system of Born could be modified to provide content to users in different languages because the system tracks users selections and modifies the content appropriately (See page 15, middle) to meet the users needs.

8. **Claims 5-7 and 30-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Born et al. (hereinafter Born) U.S. Publication 2005/0045373 published May 27, 2003 in view of Swanson et al (hereinafter Swanson) U.S. Publication 20020013784 published Jan. 2002.**

With respect to **dependent claims 5-7 and 30-32**, as indicated in the above discussion, Born teaches each element of claims 4 and 26.

Born does teach a headset with left and right attachments (See figure 2) and an audio prompt mechanism that provides a mechanism for audio to be heard via a channel.

Born does not expressly teach *the method wherein the client produces audio output in at least two channels; and the audio file is output through only one channel and wherein exactly two channels are used for the client's audio output, the two channels being a left channel and a right channel and wherein the audio file is mixed with the music when the music is playing.*

However, Swanson teaches a system that allows for a audio player complete with voice menu prompts to play audio files where there are multiple channels of the device and audio is sent over one channel and the user can interact with the device on another (Such as speaking to the device while the music is playing) (See Para 0063-0069). Swanson also teaches mixing the audio file while the music is playing (See Para 0090).

Accordingly, it would have been obvious to one of ordinary skill in the art at the time of the invention, having the teachings of Swanson and Born in front of them, to modify the system of

Born to include the multiple channels to play audio and a mechanism to mix the audio file menus while the user is listening to the music. The motivation to combine Swanson with Born comes from the suggestion in Swanson to store and playback audio files on a device where the playback allows for the music to be played and continue to be played even though a user receives an email (See Para 0031). Further, Swanson teaches that the circuitry associated with playing the audio files is used with synthesized voice commands that control the operations of the headset and therefore providing the messages when the music is still playing giving them the option to answer it or not (See Para 0039).

Response to Arguments

Applicant's arguments are not persuasive and are addressed above in the response to amendment section. Applicant provides no arguments to be applied against the rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. U.S. Patent No. 6983251 to Umemoto et al, issued Jan 3, 2006 and filed Feb. 15, 2000, that expressly teaches an audio interface with a menu that has voice activated options. The menus are loaded onto the device, and the purpose of the invention is to aid in selecting items and reading the sound information to the user. The sound information in the menu directly pertains to audio files for playing music.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the

mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven B. Theriault whose telephone number is (571) 272-5867. The examiner can normally be reached on M, W, F 10:00AM - 8:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Weilun Lo can be reached on (571) 272-4847. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



WEILUN LO
SUPERVISORY PATENT EXAMINER



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